

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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)	
Implementation of the Satellite Home)	
Viewer Extension and Reauthorization Act)	MB Docket No. 05-49
of 2004)	
)	
Implementation of Section 340 of the)	
Communications Act)	
)	

COMMENTS OF ECHOSTAR SATELLITE L.L.C.

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SUMMARY

With the adoption of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”), Congress has given satellite carriers the ability to retransmit out-of-market, significantly viewed broadcast stations to their subscribers -- a right long enjoyed by cable operators. As the Commission undertakes to update the list of significantly viewed stations that may be carried and to develop the rules that may be necessary to implement SHVERA’s significantly viewed provisions, the Commission must take care to ensure that its actions do not prevent satellite significantly viewed service from being the boon to consumers that Congress intended it to be.

The Commission is starting off on the right foot by heeding SHVERA’s command that the significantly viewed provision is self executing, permitting satellite providers to immediately begin carrying the stations on the existing list of significantly viewed stations without awaiting completion of the Commission’s rulemaking. In interpreting other aspects of the provision, the Commission should ensure that its interpretation of SHVERA’s significantly viewed provision is consistent with the plain intent of Congress to provide consumers with a broader selection of broadcast programming via satellite. In particular, the Commission should ensure that local broadcasters are not able to unilaterally block the importation of significantly viewed stations. The Commission should also ensure that its interpretations are consistent with its own decisions concerning important issues such as digital signal multicasting.

The Commission should adopt its proposal to fine-tune, rather than complicate, the existing procedures for determining and modifying significantly viewed status. The Commission’s proposal to extend the network nonduplication and syndicated exclusivity rules to significantly viewed stations, while simultaneously creating an exception from such rules for the

same stations, only to allow broadcasters to request a waiver of the exception, is not consistent with the Commission's fine-tuning effort. A simple delisting procedure could achieve the same result without the multi-layered scheme of regulation proposed by the Commission. The Commission should also avoid the adoption of rules that would make the provision of significantly viewed service overly burdensome for satellite providers, such as a requirement that SHVERA's single dish provision be applied to carriage of significantly viewed stations. This requirement would be improper for a number of other reasons as well.

By following these general principles, the Commission can help ameliorate the competitive disadvantage that has resulted from satellite providers' inability to offer significantly viewed signals, and facilitate the enjoyment of this new service by as many satellite viewers as possible, consistent with Congressional intent.

TABLE OF CONTENTS

SUMMARY	-i-
I. THE COMMISSION IS CORRECT THAT THE ABILITY OF SATELLITE CARRIERS TO RETRANSMIT AN UNLIMITED NUMBER OF SIGNIFICANTLY VIEWED STATIONS IS SELF-EXECUTING	- 2 -
A. The Existing Significantly Viewed List Is A Good Start	- 2 -
B. No Statutory Limit on Significantly Viewed Stations.	- 3 -
II. THE COMMISSION SHOULD ONLY FINE-TUNE, AND NOT COMPLICATE, THE EXISTING PROCEDURES AND METHODOLOGY FOR DETERMINING OR MODIFYING SIGNIFICANTLY VIEWED STATUS	- 3 -
A. EchoStar Supports Retention Of The Existing Survey Methodology Rules For Determining The Significantly Viewed Status Of Stations.....	- 3 -
B. Significantly Viewed Stations That Begin Broadcasting Solely in Digital Should Retain Their Significantly Viewed Status	- 4 -
III. ECHOSTAR SUPPORTS THE FCC’S PROPOSED USE OF ITS EXISTING DEFINITIONS FOR “FULL NETWORK STATION,” “PARTIAL NETWORK STATION,” AND “INDEPENDENT STATION” FOR DETERMINING THE SIGNIFICANTLY VIEWED STATUS OF BROADCAST STATIONS.....	- 5 -
IV. THE COMMISSION SHOULD ADOPT A SIMPLE DELISTING PROCEDURE INSTEAD OF THE NEEDLESSLY CONVOLUTED AND IMPROPER SCHEME OF NONDUPLICATION EXTENSION, EXEMPTION AND WAIVER.....	- 6 -
A. The Commission’s Proposal Is Inconsistent with SHVIA and Not Required By SHVERA	- 7 -
B. The Commission’s Proposal Unnecessarily Creates Three Layers of Regulation When All That Is Needed Is The Creation of A New Procedure To Remove A Station’s “Significantly Viewed” Status	- 8 -
V. THE COMMISSION SHOULD DEFINE THE SCOPE OF SATELLITE CARRIERS’ RIGHT TO CARRY SIGNIFICANTLY VIEWED STATIONS.....	- 9 -
VI. ECHOSTAR AGREES THAT RETRANSMISSION CONSENT MAY BE REQUIRED BASED ON EXISTING LAW	- 11 -
VII. ECHOSTAR OPPOSES ANY SUGGESTION THAT THE SINGLE-DISH PROVISION IN SHVERA APPLIES TO CARRIAGE OF SIGNIFICANTLY VIEWED STATIONS	- 12 -
VIII. ECHOSTAR SUPPORTS THE FCC’S PROPOSED INTERPRETATION OF “SATELLITE CARRIER” UNDER SHVERA.....	- 12 -
IX. CONGRESS’S USE OF THE BROADER DEFINITION OF “SUBSCRIBER” IN NEW SECTION 338(k) WAS INTENTIONAL AND INCLUDES COMMERCIAL ESTABLISHMENTS	- 13 -

X.	THE FCC HAS CORRECTLY INTERPRETED THE SCOPE OF THE LOCAL SERVICE REQUIREMENT FOR THE CARRIAGE OF SIGNIFICANTLY VIEWED SIGNALS	- 13 -
XI.	THE EXCEPTION TO THE SUBSCRIBER ELIGIBILITY REQUIREMENTS WHERE THERE IS NO LOCAL NETWORK AFFILIATE SHOULD BE GIVEN ITS FULL EFFECT.....	- 14 -
XII.	THE “EQUIVALENT BANDWIDTH” AND “ENTIRE BANDWIDTH” REQUIREMENTS SHOULD BE READ CONSISTENTLY WITH THE FCC’S RECENT DETERMINATION THAT MULTICAST MUST-CARRY IS NOT JUSTIFIED UNDER THE FIRST AMENDMENT	- 14 -
XIII.	THE COMMISSION SHOULD NOT RULE OUT INVOLVEMENT IN THE WAIVER PROCESS	- 16 -
XIV.	CONGRESS’S INTENT WITH RESPECT TO SECTIONS 341(a) AND 341(b) WERE DIRECTED SOLELY AT CERTAIN OREGON STATIONS AND COUNTIES AND TO THE PALM SPRINGS AND BAKERSFIELD DMAs.....	- 16 -
XV.	ECHOSTAR GENERALLY SUPPORTS A CASE-BY-CASE APPROACH TO DETERMINING WHEN VIOLATIONS OF SECTION 340 ARE IN “BAD FAITH” AND WHEN COMPLAINTS ABOUT VIOLATIONS ARE “FRIVOLOUS”	- 17 -
XVI.	NOTICE OF RETRANSMISSION OF SIGNIFICANTLY VIEWED STATIONS AND LISTING OF SIGNIFICANTLY VIEWED STATIONS ON WEBSITE.....	- 18 -
A.	Section 340(g)(1) Notices	- 18 -
B.	Listing of Significantly Viewed Stations on Satellite Carriers’ Websites	- 19 -
XVII.	CONCLUSION.....	- 20 -

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COMMENTS OF ECHOSTAR SATELLITE L.L.C.

EchoStar Satellite L.L.C. (“EchoStar”) hereby submits its comments on the matters raised in the above-captioned Notice of Proposed Rulemaking (“NPRM”) released on February 7, 2005.¹

Sections 102 and 202 of the Satellite Home Viewer Extension and Reauthorization Act of 2004 (“SHVERA”) provide satellite carriers with the ability to retransmit out-of-market, significantly viewed broadcast stations to their subscribers -- a right long enjoyed by cable operators. Pursuant to the new Section 340(c)(1)(A) of the Communications Act (introduced by SHVERA § 202), the Commission’s NPRM establishes an initial list of significantly viewed stations that may be carried (the “SV List”) and seeks comments on the rules that may be necessary to implement Section 340. EchoStar’s comments address both the issues associated with the SV List and the Commission’s proposed rulemaking.

¹ *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, FCC 05-24, Notice of Proposed Rulemaking, MB Docket No. 05-49 (rel. Feb. 7, 2005) (“NPRM”).

I. THE COMMISSION IS CORRECT THAT THE ABILITY OF SATELLITE CARRIERS TO RETRANSMIT AN UNLIMITED NUMBER OF SIGNIFICANTLY VIEWED STATIONS IS SELF-EXECUTING

A. The Existing Significantly Viewed List Is A Good Start

EchoStar commends the Commission’s diligent efforts to update the list of significantly viewed stations (the “SV List”). Of course, as the Commission recognizes, Congress intended satellite carriers to have the immediate ability to carry significantly viewed stations based on the Commission’s determinations made before SHVERA’s enactment, as these determinations are reflected in the SV List.² Section 340 of the Communications Act expressly provides that “a satellite carrier is . . . authorized” to carry significantly viewed stations without any qualification. Accordingly, the significantly viewed provision is self-executing and is not dependent on any implementing regulations by the FCC.

EchoStar also supports the FCC’s view that community listings or descriptions should generally include the area of natural growth of the community, meaning that the description of the community in the pre-SHVERA SV List would encompass the community so denominated today. It would be impractical and unrealistic to attempt to recreate community boundaries as they existed back in the 1970s and to thereby limit the rights intended to be conferred on satellite carriers by Congress.

Incorporation of areas of natural growth should not, however, lead to automatic reopening of the question of whether a station still qualifies as significantly viewed with the addition of the expanded area. Rather, there should be a presumption that stations remain

² NPRM ¶ 14 (“Based on the short time frame mandated by the SHVERA for publication of the SV List, as well as the legislative history, we believe that Congress intends for satellite carriers to make use of the SV List to expand their carriage offerings so that their subscribers can begin to experience the benefits of the SHVERA as soon as possible.”); *id.* at ¶ 14 n.38 (noting Senator Barton’s floor statement that satellite carriers are authorized to carry significantly viewed signals “upon enactment.”).

qualified, unless and until an interested party submits appropriate audience survey data, as specified in the Commission's rules, indicating that the station no longer qualifies and justifying the delisting of that station.

B. No Statutory Limit on Significantly Viewed Stations.

The Commission also correctly concluded that “there is no statutory limit on the number of significantly viewed signals a satellite carrier may carry.”³ The limit of two distant affiliates that satellite carriers are permitted to carry under the distant signal license clearly does not apply to satellite carriage of “significantly viewed” stations, because the language of section 340 expressly states that a satellite carrier's ability to carry significantly viewed stations is “in addition to” its ability to carry local stations under Section 338 and distant stations under Section 339 of the Communications Act.⁴ This reading is consistent with the copyright provisions in SHVERA, which also state that the statutory license for secondary transmissions of “significantly viewed” stations applies “notwithstanding” the two-station limit in 17 U.S.C. § 119(a)(2)(B).⁵

II. THE COMMISSION SHOULD ONLY FINE-TUNE, AND NOT COMPLICATE, THE EXISTING PROCEDURES AND METHODOLOGY FOR DETERMINING OR MODIFYING SIGNIFICANTLY VIEWED STATUS

A. EchoStar Supports Retention Of The Existing Survey Methodology Rules For Determining The Significantly Viewed Status Of Stations.

There is no basis for substantial changes to the criteria for determining which stations are “significantly viewed,” as the existing process has generally worked well thus far. Indeed, SHVERA requires the Commission to use the rules that it had in place as of April 15,

³ NPRM ¶ 10.

⁴ 47 U.S.C. § 340(a).

⁵ 17 U.S.C. § 119(a)(3)(A).

1976 for making such determinations⁶ -- namely, the viewership criteria found in 47 C.F.R. § 76.5(i) and the procedures found in 47 C.F.R. § 76.54. However, EchoStar agrees with the Commission that minor changes to the rules can be made to accommodate new developments contemplated by Congress when it passed SHVERA. For example, the technical amendments proposed by the FCC to add references to the “noise limited service contour” for digital service are an appropriate change necessary to effectuate the will of Congress.⁷

B. Significantly Viewed Stations That Begin Broadcasting Solely in Digital Should Retain Their Significantly Viewed Status

As the NPRM notes, “the Commission has previously decided that the digital signal of a television broadcast station will be accorded the same significantly viewed status as that of the analog signal, except that where the station is broadcasting only a digital signal, the station must petition for significantly viewed status using the analog requirements in Section 76.54.”⁸

EchoStar agrees with the Commission’s present practice of according the digital signal of a broadcast station the same “significantly viewed” status as the analog signal.⁹ However, the Commission’s approach towards stations broadcasting only in digital requires some clarification. It is unclear whether the Commission’s “exception” deals only with a new digital-only station or also with a “significantly viewed” analog station that has fully converted to digital and stopped transmitting in analog. With respect to new digital stations that did not have a “significantly viewed” analog predecessor, it obviously makes sense to require such stations to establish “significantly viewed” status. However, with respect to “significantly

⁶ SHVERA § 102(6) (inserting 17 U.S.C. § 119(a)(3)(A)).

⁷ NPRM ¶ 20.

⁸ NPRM ¶ 20.

⁹ *Id.*

viewed” analog stations that have converted to digital and stopped transmitting in analog, it makes no sense to require such stations to petition again to re-qualify for “significantly viewed” status.¹⁰ Such a rule would hinder, not aid, the DTV transition, and could lead to a sudden loss of carriage of stations that convert to digital-only broadcasting early -- an unnecessary penalty on subscribers and on the stations that timely complete the digital conversion.

Accordingly, the Commission should make it clear that only new digital-only stations would be required to qualify for “significantly viewed” status, and not “significantly viewed” analog stations that have simply completed their conversion to digital-only.

III. ECHOSTAR SUPPORTS THE FCC’S PROPOSED USE OF ITS EXISTING DEFINITIONS FOR “FULL NETWORK STATION,” “PARTIAL NETWORK STATION,” AND “INDEPENDENT STATION” FOR DETERMINING THE SIGNIFICANTLY VIEWED STATUS OF BROADCAST STATIONS

EchoStar agrees with the Commission’s tentative conclusion that SHVERA likely precludes the Commission from applying definitions of “full network station,” “partial network station” and “independent station” different from the 1976 standard incorporated by reference in the statute.¹¹ As the NPRM observes, in spite of Congress’s direction that the 1976 standard be used for determining significantly viewed status for stations, elsewhere in SHVERA Section 340 the statute uses definitions of “network station” and “superstation” (the latter being similar to “independent station”) that differ from the definitions in the 1976 standard.¹² Congress has provided no guidance as to how the Commission should resolve this inconsistency. The

¹⁰ To the extent a broadcaster believes that such a station no longer qualifies as significantly viewed, that broadcaster should utilize the Commission’s existing procedures for disqualifying the station (provided the broadcaster has standing to do so under the Commission’s rules).

¹¹ See SHVERA § 102(6) (inserting new 17 U.S.C. § 119(a)(3)).

¹² NPRM ¶ 22 (noting that SHVERA Section 340 incorporates the copyright definitions of “network station” and “superstation”).

Commission's solution -- to use the 1976 standard for purposes of determining significantly viewed status, and to use the SHVERA definitions of "network station" and "superstation" for other purposes such as subscriber eligibility -- neatly resolves the apparent inconsistency.

IV. THE COMMISSION SHOULD ADOPT A SIMPLE DELISTING PROCEDURE INSTEAD OF THE NEEDLESSLY CONVOLUTED AND IMPROPER SCHEME OF NONDUPLICATION EXTENSION, EXEMPTION AND WAIVER

The Commission correctly notes that Section 340(e)(1) allows the Commission to adopt rules to permit assertion of the exclusivity rules by stations and distributors with respect to stations carried by satellite carriers under the new significantly viewed provisions.¹³ However, it wrongly concludes that "[t]his provision requires us, therefore, to (1) create a limited right for a station or distributor to assert exclusivity with respect to a station carried by a satellite carrier as significantly viewed; (2) allow that significantly viewed station to assert the significantly viewed exception, just as a station would with respect to cable carriage; and (3) allow the station or distributor asserting exclusivity to petition us for a waiver from the exception."¹⁴

On the contrary, there is no language in Section 340 that would "require" the Commission to engage in such a convoluted scheme of regulation. Moreover, any extension of the network nonduplication and syndicated exclusivity rules to satellite carriers would be inconsistent with the exclusivity framework Congress adopted in the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"). A simple delisting procedure can accomplish the same result as a "waiver" of the "exception" to the extension of the rules.

To be clear, the Commission is proposing to simultaneously extend the cable program exclusivity rules to "significantly viewed" stations carried by satellite and create an

¹³ NPRM ¶ 26.

¹⁴ *Id.*

exception for the very same stations from the very same rule, which can then be overridden by broadcasters requesting a waiver of the exception. But essentially, it appears that the Commission is trying to create a mechanism by which broadcast stations can lose their “significantly viewed” status in a particular community, *i.e.* a means by which a station can be removed from the SV List. Delisting of the station if it no longer meets the qualification for “significantly viewed” status will achieve this more directly and properly than the twisted, multi-layered scheme of regulation the NPRM contemplates.

A. The Commission’s Proposal Is Inconsistent with SHVIA and Not Required By SHVERA

As noted above, the extension of the network nonduplication and syndicated exclusivity rules to stations carried by satellite other than “nationally distributed superstations” is inconsistent with SHVIA. When Congress passed that law, it was keenly aware of the operational problems that satellite carriers would face in having to deal with nonduplication and syndicated exclusivity blackouts over their satellite-based platforms; Congress therefore limited the application of these rules to “nationally distributed superstations.” SHVERA cannot be read to have abolished that limitation *sub silentio*. In fact, SHVERA specifically provides that “Nothing in [the significantly viewed provision] shall permit the application of network nonduplication or syndicated exclusivity regulations to the retransmission of distant signals of *network* stations that are carried by a satellite carrier pursuant to a statutory license under section 119(a)(2)(A) or (B) of title 17”¹⁵

Moreover, SHVERA does not require the imposition of cable-like network nonduplication and syndicated exclusivity rules on satellite carriage of significantly viewed stations on a going-forward basis. At most, SHVERA requires the Commission to recognize that

¹⁵ 47 U.S.C. § 340(e)(2) (emphasis added).

significantly viewed stations that have been the subject of waivers of the “significantly viewed” exception *prior to SHVERA’s enactment* are no longer “significantly viewed” for the purposes of Section 340. Specifically, Section 340(a) provides that significantly viewed stations are (1) those that have been determined by the Commission to be “significantly viewed” prior to the enactment of SHVERA, “except to the extent that such signal is prevented from being carried by a cable system in such community under the Commission’s network nonduplication and syndicated exclusivity rules”; and (2) are determined by the Commission after the enactment of SHVERA to be significantly viewed under the Commission’s rules. The reference to the nonduplication and syndicated exclusivity rules is only in section 340(a)(1), the paragraph referring to pre-enactment “significantly viewed” determinations.¹⁶ Nothing in section 340(a)(2), the paragraph dealing with post-enactment “significantly viewed” determinations, requires extension of the nonduplication and exclusivity rules going forward.

B. The Commission’s Proposal Unnecessarily Creates Three Layers of Regulation When All That Is Needed Is The Creation of A New Procedure To Remove A Station’s “Significantly Viewed” Status

The Commission’s aim in proposing to extend the cable program exclusivity rules to “significantly viewed” stations, creating an exception for the same stations, and then permitting broadcasters to request a waiver of the exception, appears to be the creation of a mechanism for removing a station from the SV List. After all, to obtain a waiver of the “significantly viewed” exception under the cable rules, a local broadcaster would have to show that for two consecutive years the out-of-market station in question was no longer significantly

¹⁶ The Commission has properly recognized this aspect of section 340(a)(1) in its SV List.

viewed, based either on community-specific or system-specific, noncable viewing data, to one standard error.¹⁷

But there is a much easier way of achieving this objective without creating tortured layers of regulation. The Commission should simply create a delisting process. Such a process should involve the same substantive standards as for waivers under the cable rules -- *i.e.* the party seeking decertification would have to demonstrate that, for two consecutive years, a station was no longer significantly viewed based either on community-specific or system-specific noncable (*i.e.*, over-the-air) viewing data, to one standard error. As is the case for cable, only those local broadcasters that are able to petition for a waiver of the “significantly viewed” exception under the cable program exclusivity rules should be permitted to seek the de-listing of a station from the SV List. Such a mechanism would be much simpler and more straightforward than the Commission’s proposed extension, exception, and waiver regime.

V. THE COMMISSION SHOULD DEFINE THE SCOPE OF SATELLITE CARRIERS’ RIGHT TO CARRY SIGNIFICANTLY VIEWED STATIONS

SHVERA defines “community” for the purposes of the “significantly viewed” provisions as follows:

- (A) a county or a cable community, as determined under the rules, regulations and authorizations of the Commission applicable to determining with respect to a cable system whether signals are significantly viewed; or
- (B) a satellite community, as determined under such rules, regulations and authorizations (or revisions thereof) as the

¹⁷ NPRM ¶ 25 n.77. For each year, the data for such a finding must be obtained as a result of independent professional surveys taken during two one-week periods separated by at least 30 days, no more than one of which may be taken between April and September of each year. In addition, if the survey covers more than one community, the sample must be proportionately distributed among the relevant communities, as described in 47 C.F.R. § 76.54(b). *Id.*

Commission may prescribe in implementing the requirements of this section.

The Commission has tentatively decided to interpret “community” for the purposes of the satellite significantly viewed provisions to mean “cable community” where such a community has already been defined by the Commission.

However “communities” are defined for purposes of significantly viewed, the Commission should undertake to map and assign zip code groupings to each community identified in the SV List. Use of zip codes is a simple and accurate method for satellite carriers to approximate the boundaries of a community and determine the significantly viewed stations that a subscriber is eligible to receive. To the extent more granularity is desirable, the Commission can also use zip-code-plus-four (“zip+4”) groupings. Also, to the extent a zip code extends beyond the boundaries of a community, the Commission should use the 10% overlap rule similar to the one it has used for spectrum cap purposes: if 10% or more of the zip code’s population is included in the community, that zip code should be deemed included.¹⁸ In any event, what matters to EchoStar is certainty, and the Commission should take care to develop a clear body of rules in this area. Until such mapping is complete, satellite carriers who use reasonable good faith efforts to confine the retransmission of significantly viewed stations to zip code groupings that most closely approximate the community should be deemed to be in good faith compliance with the significantly viewed provisions.

Where a “cable community” has not been defined, the Commission proposes two alternatives to define a “satellite community”: (1) defining community based on one or more five-digit zip codes; or (2) using geopolitical boundaries for incorporated municipalities and zip

¹⁸ See, e.g., 47 C.F.R. § 20.6(c)(1) (defining “significant overlap” for purposes of PCS/SMR spectrum aggregation limits as when at least 10% of the population of one service area is within another service area).

codes for unincorporated areas.¹⁹ Again, whichever alternative the Commission uses, zip codes should be the system's common denominator. This means that, if the Commission were to choose the second alternative, the geopolitical boundaries used for incorporated areas should be approximated by the use of zip codes. EchoStar continues to study this issue and will report to the Commission any further conclusions it draws from this study.

VI. ECHOSTAR AGREES THAT RETRANSMISSION CONSENT MAY BE REQUIRED BASED ON EXISTING LAW

The FCC notes that carriage of “significantly viewed” stations will require retransmission consent under Section 325(b) of the Communications Act, unless an exception to that requirement applies (*e.g.* the significantly viewed signal is being provided as a distant signal to an unserved household). This is a fair reading of the law. The Commission should clarify, however, that, depending on the retransmission agreement with a significantly viewed station, the satellite carrier can serve all households in the community at issue under the significantly viewed station provisions, whether a particular household is served or not.

The Commission should also clarify its observation that, under SHVERA, “a satellite carrier would still be exempt from having to negotiate retransmission consent when providing a significantly viewed signal if it *was* providing it as a distant signal to an unserved household.”²⁰ Of course, under SHVERA, a satellite carrier may in the future offer a distant signal to eligible households without obtaining retransmission consent to the extent permitted by law, regardless of that signal's status as significantly viewed.

¹⁹ NPRM ¶¶ 31-32.

²⁰ NPRM ¶ 33 (emphasis added).

VII. ECHOSTAR OPPOSES ANY SUGGESTION THAT THE SINGLE-DISH PROVISION IN SHVERA APPLIES TO CARRIAGE OF SIGNIFICANTLY VIEWED STATIONS

By its terms, the single dish provision in SHVERA does not apply to the carriage of significantly viewed stations. Moreover, any rule that would impose a single-dish requirement on the carriage of such stations would be inconsistent with the voluntary nature of significantly viewed carriage as well as unconstitutional.

The single dish provision in SHVERA applies only to local-into-local service.²¹ Any extension of the requirement is not warranted by the statute. There is no anti-discrimination obligation, for example, associated with carriage of “significantly viewed” stations, which is consistent with the fact that carriage of such stations is optional rather than mandatory.²²

VIII. ECHOSTAR SUPPORTS THE FCC’S PROPOSED INTERPRETATION OF “SATELLITE CARRIER” UNDER SHVERA

The FCC proposes to interpret “satellite carrier” as used in SHVERA to include (1) entities that both own and operate their own satellite facilities as well as package programming for their subscribers (like most DBS operators); (2) entities that lease FSS capacity from another entity in order to provide DTH programming packages to their subscribers; and (3) entities using a non-U.S. licensed satellite to provide programming to subscribers in the U.S. pursuant to a blanket earth station license.²³ EchoStar supports this proposed interpretation, as it ensures that all satellite television providers (no matter how configured) will be subject to both the benefits and burdens of SHVERA. EchoStar also urges the Commission to continue to

²¹ 47 U.S.C. § 338(g) (“Each satellite carrier that retransmits the analog signals of local television broadcast stations in a local market shall retransmit such analog signals in such market by means of a single reception antenna and associated equipment.”).

²² *See id.* § 340(d)(1) (“carriage of a signal under [the significantly viewed provisions] is not mandatory”).

²³ NPRM ¶ 25.

broadly interpret the term in the future so that satellite television providers employing other business models, which might include resellers depending on the circumstances, come within SHVERA's purview.

IX. CONGRESS'S USE OF THE BROADER DEFINITION OF "SUBSCRIBER" IN NEW SECTION 338(k) WAS INTENTIONAL AND INCLUDES COMMERCIAL ESTABLISHMENTS

As for subscribers eligible to receive significantly viewed signals, SHVERA defines the term "subscriber" in new Section 338(k) by reference to the definition in 17 U.S.C. § 122(j)(4) (the local-into-local license), which provides that a subscriber is "a person who receives a secondary transmission service from a satellite carrier and pays a fee for the service, directly or indirectly to the satellite carrier or to a distributor." As the Commission observes, this definition makes the provision broader than 17 U.S.C. § 119, which limits retransmission to individuals in private homes.²⁴ EchoStar agrees with the Commission's further observation that Congress's use of the broader term was intentional -- specifically, that Congress intended to treat subscribers to significantly viewed stations in the same manner as subscribers to local service.²⁵ Thus, eligible subscribers include commercial establishments.

X. THE FCC HAS CORRECTLY INTERPRETED THE SCOPE OF THE LOCAL SERVICE REQUIREMENT FOR THE CARRIAGE OF SIGNIFICANTLY VIEWED SIGNALS

The Commission is correct that, under the significantly viewed provision:

- (1) a subscriber receiving local-into-local service in a market is eligible for significantly viewed stations even if the local stations retransmitted by the satellite carrier exclude an affiliate of the network with which a significantly viewed station is affiliated; and

²⁴ *Id.* at ¶ 37.

²⁵ *Id.*

- (2) only subscribers receiving local channels via satellite (and not merely over-the-air) are eligible to receive significantly viewed signals.

As the Commission correctly notes, a subscriber should not be deprived of access to a significantly viewed station simply because the local station refused to grant retransmission consent or is otherwise ineligible for local carriage.

XI. THE EXCEPTION TO THE SUBSCRIBER ELIGIBILITY REQUIREMENTS WHERE THERE IS NO LOCAL NETWORK AFFILIATE SHOULD BE GIVEN ITS FULL EFFECT

Section 340(b)(3) provides for an exception to the subscriber eligibility requirements for the receipt of analog and digital significantly viewed stations where there is no local network affiliate, *i.e.*, the satellite carrier can carry a significantly viewed network station where there is no local network affiliate. The plain meaning of this exception is that, in such cases, no local-into-local service needs to be offered by the satellite carrier. There is, therefore, no statutory warrant to import such a limitation on satellite carriers' right to carry a "significantly viewed" network station where there is no local network affiliate. In addition, the fact that there is no similar exception on the copyright side of SHVERA does not affect the final analysis. Statutes must be read as a whole and every provision should be given effect.²⁶ To deny satellite carriers the benefit of the exception in section 340(b)(3) because of the absence of a similar provision on the copyright side would be to deny the effect of that provision altogether.

XII. THE "EQUIVALENT BANDWIDTH" AND "ENTIRE BANDWIDTH" REQUIREMENTS SHOULD BE READ CONSISTENTLY WITH THE FCC'S RECENT DETERMINATION THAT MULTICAST MUST-CARRY IS NOT JUSTIFIED UNDER THE FIRST AMENDMENT

SHVERA requires satellite carriers to either (a) devote "equivalent bandwidth" to the carriage of a local network station as to the distant significantly viewed station; or (b) carry

²⁶ See, e.g., *Alaska Dep't of Env'tl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004).

the “entire bandwidth” of the local network station’s digital signal. However, to ensure that these provisions are not interpreted in a way that would unconstitutionally import a multicast must-carry requirement, the “equivalent bandwidth” and “entire bandwidth” should be read to apply only to the primary video feed of the local station.

Such an interpretation would be consistent with the Commission’s recent decision to accord must-carry rights only to a broadcasters’ primary video programming stream.²⁷ In that decision, the Commission found that a requirement to carry all of a broadcaster’s digital video streams (if the broadcaster chooses to multicast) would not promote any of the governmental interests recognized as “important” in *Turner Broad. Sys., Inc. v. FCC*,²⁸ and would accordingly be unsustainable under the “intermediate protection” standard set forth in *United States v. O’Brien*.²⁹ An interpretation of the satellite significantly viewed “equivalent bandwidth”/ “entire bandwidth” provisions in a manner that would force satellite carriers to carry multicast streams could not be squared with the Commission’s conclusion in the *Digital Signal Carriage Order*. Accordingly, the provisions should be read to apply only to the local station’s primary video feed.

²⁷ *In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Second Report and Order and First Order on Reconsideration, CS Docket No. 98-120, FCC 05-27 (rel. Feb. 23, 2005) (“*Digital Signal Carriage Order*”).

²⁸ 520 U.S. 180 (1997) (upholding the cable must-carry rules as a furtherance of the governmental interests in preserving the benefits of free, over-the-air local broadcast television for viewers and promoting the widespread dissemination of information from a multiplicity of sources. A plurality of the Justices also held that the must carry rules promoted the interest of fair competition in the market for television programming).

²⁹ *Digital Signal Carriage Order* at ¶ 38-41 (discussing *United States v. O’Brien*, 391 U.S. 367 (1968)).

XIII. THE COMMISSION SHOULD NOT RULE OUT INVOLVEMENT IN THE WAIVER PROCESS

The Commission has tentatively concluded that it should not preside over the waiver process (either for significantly viewed stations or for stations imported under the Section 119 license), as it reads SHVERA's legislative history to indicate that waivers are a matter relegated to the business judgment of broadcasters.³⁰ In EchoStar's view, however, the Commission should not rule out the possibility of prescribing rules in the future to govern the behavior of parties during the waiver process. Instead, the FCC should reserve the right to intervene if there is evidence of discrimination or other abuses in the waiver process.

XIV. CONGRESS'S INTENT WITH RESPECT TO SECTIONS 341(a) AND 341(b) WERE DIRECTED SOLELY AT CERTAIN OREGON STATIONS AND COUNTIES AND TO THE PALM SPRINGS AND BAKERSFIELD DMAs.

EchoStar agrees with the Commission's conclusion that Section 341(a) applies to stations in four specific counties in Oregon,³¹ and the limitations in Section 341(b) apply only to the Palm Springs and Bakersfield DMAs.³² The FCC should therefore affirm its findings in this regard.

The Commission should also note that the ability to carry stations under Section 341(a)(1)(A) depends, in part, upon whether "any cable operator . . . was retransmitting [the station] to subscribers in the county on January 1, 2004." Because neither the Commission nor satellite carriers have reliable information as to which stations were carried on what cable

³⁰ NPRM ¶¶ 51-52.

³¹ The counties are: Umatilla (25,050 TV households), Wallowa (2,910 TV households), Grant (3,040 TV households), and Malheur (10,350 TV households), for a total of 41,340 TV households in the four counties as reported by Nielsen Media Research 2004 U.S. Television Household Estimates.

³² *See id.* ¶¶ 53-54.

systems as of that date, the Commission should require the cable systems in the affected Oregon counties to provide this information to the Commission.

XV. ECHOSTAR GENERALLY SUPPORTS A CASE-BY-CASE APPROACH TO DETERMINING WHEN VIOLATIONS OF SECTION 340 ARE IN “BAD FAITH” AND WHEN COMPLAINTS ABOUT VIOLATIONS ARE “FRIVOLOUS”

SHVERA provides for Commission enforcement of violations of the significantly viewed provisions, including cease-and-desist orders as well as statutory damages of \$50 per subscriber per station per day if the satellite carrier acts in “bad faith” or if the broadcaster’s complaint is “frivolous.”³³ The Commission notes that, while it is inclined to address allegations of bad faith or frivolous complaints on a case-by-case basis, it seeks comment on whether particular circumstances would “generally warrant such a finding.”³⁴ Among other things, the Commission asks whether it should be deemed bad faith when a satellite provider carries a station on the current SV List that is subsequently removed from the list by the Commission; fails to notify all broadcast stations in the market 60 days prior to commencing carriage of significantly viewed stations; or fails to provide such prior notice to only one station.

With respect to these examples, EchoStar submits that:

- (1) retransmission based on the SV List, by definition, cannot result in a “bad faith” violation as such conduct is contemplated by SHVERA -- thus, the Commission has correctly concluded that such action would not be bad faith;
- (2) inadvertent failure by a satellite carrier to notify all broadcast stations in the local market should also not constitute “bad faith” -- the question should be evaluated based on the circumstances;

³³ *Id.* ¶ 55.

³⁴ *Id.* ¶ 56.

- (3) complaints by a broadcaster (whether for damages or not) that a satellite carrier has failed to notify a *different* broadcaster should be considered “frivolous;” and
- (4) where broadcasters bring complaints *en masse* without regard to the merits, such complaints should constitute “frivolous” complaints.

Generally, EchoStar agrees that the Commission should examine claims of bad faith and frivolous complaints on a case-by-case basis, as such assessments are likely to be very fact-specific. However, to the extent the Commission desires to adopt some general *per se* rules concerning bad faith and frivolous complaints, such rules should be consistent with the principles EchoStar identifies above.

XVI. NOTICE OF RETRANSMISSION OF SIGNIFICANTLY VIEWED STATIONS AND LISTING OF SIGNIFICANTLY VIEWED STATIONS ON WEBSITE

A. Section 340(g)(1) Notices

EchoStar supports the Commission’s finding that Section 340(g)(1) notices be sent to the station’s principal place of business as listed in the Commission’s database. Local stations have a responsibility to ensure that their details on the Commission’s database are accurate and satellite carriers should be permitted to rely on the database.

However, sending Section 340(g)(1) notices by certified mail is unnecessary. While use of certified mail is reasonable in the must-carry election context because the various notices involved trigger important rights and deadlines, the Section 340(g)(1) notice indicating that a satellite carrier proposes to commence retransmitting significantly viewed stations involves no such rights or deadlines. Consequently, the extra cost of requiring Section 340(g)(1) notices to be sent by certified mail is not justified. First class mail should be adequate.

B. Listing of Significantly Viewed Stations on Satellite Carriers' Websites

EchoStar urges the Commission to recognize that the listing of “significantly viewed” stations and associated communities on each satellite carrier’s website could be quite long and complex. Accordingly, the Commission should clarify that satellite carriers have 10 days to update their website listing with any changes. The Commission itself is permitted 10 days to update the SV List;³⁵ satellite carriers should be afforded a similar time to update their websites as well. Moreover, the Commission should consider whether to allow satellite providers to utilize more user-friendly means of informing consumers about the significantly viewed stations that are carried -- for example, a look-up function on a website that permits a visitor to type in a zip code to retrieve a list of the significantly viewed stations available to viewers in that zip code.

³⁵ *See id.* ¶ 11 (citing 47 U.S.C. § 340(c)(2)).

XVII. CONCLUSION

EchoStar urges the Commission to take the foregoing comments into account in developing rules regarding satellite carriage of significantly viewed stations.

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